BANK BUMIPUTRA (M) BHD.

v.

MAHAMERU LUMBER SDN. BHD.

HIGH COURT MALAYA, KUANTAN
VC GEORGE J
[CIVIL SUIT NO. 53 OF 1978]
18 JANUARY 1982

CIVIL PROCEDURE: *Claim of money advanced and secured by debenture - Plaintiff's legal fee - Whether payable by the defendants - A condition of the debenture that legal fees and disbursements to be borne by the defendants - Claim for legal fees - Whether premature - Refusal by Senior Assistant Registrar.*

The plaintiff had claimed against the defendants a sum of RM81,647.87 being money advanced with interests and costs and RM6,000 being the plaintiff's legal fees. As the defendants failed to enter appearance to the writ the learned Senior Assistant Registrar allowed the plaintiff to enter judgment in default of appearance for the sum of RM81,647.87 but refused the plaintiff's claim for legal fees. The plaintiff therefore appealed against the refusal.

Held:

[1] The plaintiff was entitled to recover only such amount of money actually incurred or paid by way of expenses (including legal fees) and not any amount that will be incurred. There is no averment that any such expenses had been incurred or paid and therefore it would be premature to claim for it.

[2] The Senior Assistant Registrar was justified in refusing to allow the plaintiff to enter judgment for the legal fees.

[Appeal dismissed.]

Case referred to:
Esso Petroleum v. Alstonbridge Properties [1975] 3 All ER 358

Other sources referred to:
Supreme Court Practice 1979, para. 6/2/6

JUDGMENT

VC George J:

By a specially indorsed writ the plaintiff claimed against the defendants as follows:

(a) RM81,674.87 as at 30 June 1977 with interest thereon at 10.8% per annum with daily rests from 1 July 1977 till realisation;

(b) RM6,000 being the plaintiff's legal fees;

(c) costs;

(d) further or other relief.

None of the defendants entered an appearance to the writ and the learned Senior Assistant Registrar allowed the plaintiff to enter judgment in default of appearance against the defendants for the RM81,674.87 with interest and costs but refused to allow the plaintiff to enter judgment for the RM6,000 claimed as the plaintiff's legal fees.

Against such refusal the plaintiff has appealed to me.

Mr. Sivasubramanian's argument in support of the appeal is that the RM6,000 claimed is a liquidated demand and since the defendants have chosen not to dispute the claim the plaintiff is entitled to enter judgment in respect of it. He referred me to para. 6/2/6 of the 1979 Supreme Court Practice.

The main claim was in respect of money advanced by the plaintiff bank to the 1st defendant secured by a debenture executed by the 1st defendant and by a document of guarantee executed by each the 2nd, 3rd and 4th defendants.

In the statement of claim the plaintiff averred by way of particulars in respect of the claim of RM6,000 as follows:

> It was a condition of the said debenture that if any moneys payable by the first defendant under the said debenture shall be required to be recovered by any process of law, or if any moneys payable thereunder shall be placed in the hands of solicitors for collection, the first defendant shall pay in addition to moneys then due and payable thereunder the plaintiff's solicitors' fees (on a solicitor and client basis) and any other fees and expenses incurred in respect of such collection.
>
> It was a condition of the guarantee that all costs and disbursements (legal or otherwise and where legal both judicial and extra judicial on a solicitor and client's basis) incurred or paid by the plaintiff incidental to the guarantee or the collection of any moneys due or to become due thereunder shall be borne and paid by the second, third and fourth defendants.
>
> On 30 June 1977 a sum of RM81,674.87 was due from the defendants.
>
> The plaintiff will incur RM6,000 as legal fees.

To my mind on a true construction of the aforesaid conditions the plaintiff was entitled to recover from the defendants such amount of money actually incurred or paid by way of expenses (including legal fees) and not any amount that will be incurred.

There is no averment that any such expenses had been incurred or paid. In fact what the plaintiff had contended in the statement of claim is that "plaintiff will incur RM6,000 as legal fees." It seem to me that until that amount was in fact incurred or paid by the plaintiff it would be premature to claim for it.

In *Esso Petroleum v. Alstonbridge Properties* [1975] 3 All ER 358 in a situation where a loan was required to be repaid in instalments with a proviso that if there was any delay in the payment of any one instalment then upon demand to do so the whole of the balance would become due and payable forthwith, Walton J said (at page 367 of the report), "My difficulty is that the demand in the present case is a demand which of its own intrinsic nature changes the nature of the liability; it turns a liability to pay by instalments into a liability to pay the whole at once. Under these circumstances, in my judgment, even as against a principal debtor, a demand antecedent to the issue of proceedings is a necessary prerequisite of the whole cause of action. I would put it this way; that where the pre-existing obligation is to pay the debt by instalments, the demand that it be paid in one lump sum is an act which radically changes the nature of the debtor's obligation, and so is an essential ingredient of any cause of action to recover the lump sum. I think the case is precisely equivalent to the type of case envisaged by Scrutton LJ in *Bradford Old Bank Ltd. v. Sutcliffe*, where he said, 'But it is otherwise where the debt is not present, but to accrue ...' i.e. in such cases a demand is requisite. This appears to me to be the case here."

In the instant case it is similarly an essential ingredient to the cause of action to recover expenses incurred by the plaintiff that in fact the expenses had been incurred or paid.

In my view the plaintiff has not shown on the face of the statement of claim that it has a cause of action against the defendants or any of them in respect of the RM6,000 or any part there of and in the circumstances in my judgment the Senior Assistant Registrar was justified in refusing to allow the plaintiff to enter judgment for that amount.

I might add that the passage in the White Book (6/2/6) referred to me by Mr. Sivasubramanian would be relevant only if there was a cause of action in respect of the claim.

Also found at [1982] CLJ 194